IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

O R D E R

S.B. CRIMINAL APPEAL NO.92/1988
(Gurtej Singh Vs. State)

Date of order : 01.12.2006

P R E S E N T

HON'BLE MR. JUSTICE GOPAL KRISHAN VYAS

Mr. R.K. Singhal, for the appellant.
Mr. L.R. Upadhyay, Public Prosecutor.

The present criminal appeal is directed against the judgment dated 29.1.1988 passed by District & Sessions Judge, Sri Ganganagar in Sessions Case No.17/1997 whereby the appellant was convicted for committing offence under Section 376 I.P.C. and sentenced to three years RI along with fine of Rs.500/- and in default of payment of fine to further undergo RI for six months.

As per the prosecution story on 28.9.1986 when prosecutrix Vimla was coming alone from 'dhani' of one Sheokaran where her husband was employed, she was carrying a 'dolu' (milk-pot) and passing through

'pagdandi' of the agricultural fields of one Hardial Singh, she was fallen down by accused appellant forcibly and when she tried to resist, the accused-appellant forcibly caught hold of her and committed rape upon her.

As per the prosecution story, glass bangles of Vimla were also broken and fallen down on the agricultural fields and milk, which she was carrying in 'dolu' was also fallen down and thereafter the accused-appellant immediately ran away from the place of occurrence. It was also alleged that at the time of committing rape as alleged by the prosecutrix due to force, her clothes were also damaged including the 'nada' of her 'salwar'. Thereafter, when the prosecutrix raised voices one Smt. Mahendra Kaur W/o Chitu Singh came and she narrated all these facts to her. Thereafter, having reached the home, she called her husband – Sohanlal and thereafter, she filed FIR on 29.8.1986 at 8.00 a.m. at Police Station Chunavat.

Upon the aforesaid FIR, regular investigation was conducted by the Investigating Officer and thereafter, challan was filed before the Additional Munsif & Judicial Magistrate, Sri Ganganagar and the case was committed to the Sessions Court for trial.

Along with the challan, list of witnesses was also filed. In all 13 persons were named in the list of witnesses to prove the prosecution case. However,

before the trial court 11 prosecution witnesses were examined namely PW-1 Vimla (Prosecutrix), PW-2 Sohan Lal (husband of prosecutrix), PW-3 Hardial Singh, PW-4 Jas Ram, PW-5 Inderjeet, PW-6 Jeet Singh, PW-7 Smt. Mahender Kaur, PW-8 Dr. Rajender Kumar Gupta, PW-9 Sade Khan, PW-10 Gulab Chand and PW-11 Surja Ram. Thereafter statement of accused-appellant under Section 313 Cr.P.C. was also recorded in which while refuting all the charges, the accused-appellant specifically stated that prosecutrix was regularly taking the agricultural produce from his field without his permission and when he was objecting, this false case was registered against him.

Learned counsel for the accused-appellant contended that the prosecution has failed to prove its case beyond reasonable doubt and concocted and fabricated story has been made by the prosecution. There is no evidence on record to prove the prosecution case. Therefore, the trial court has committed error while convicting the accused-appellant for the alleged offence as above. While attacking upon the evidence, it is contended by the learned counsel for the appellant that age of prosecutrix was admittedly more than 30 years at the time of commission of alleged offence. As per the counsel for the appellant out of 11 witnesses PW-3 Hardial Singh in whose agricultural fields, the rape was alleged to be committed, has turned hostile. Likewise, PW-4 Jas

Ram has also turned hostile and PW-5 Inderjeet for whom the prosecutrix was saying that she sent Inderjeet to call her husband also turned hostile. PW-6 Jeet Singh – motbir of preparation of site plan has also turned hostile. PW-7 Smt. Mahender Kaur whose name was mentioned in the FIR Ex-P/1 so also whose name was mentioned in the statement of PW-1 (prosecutrix) that she narrated whole story to her just after the occurrence took place, has also turned hostile before the trial court and in the statement of PW-8 Dr. Rajender Kumar, it is categorically stated that at the time of medical examination, there was no injury upon the body of prosecutrix and she was married woman having children and her cloths were also not damaged. PW-8 Dr. Rajender Kumar, who conducted the medical examination of prosecutrix, also stated that as per the examination of body, there was no positive sign upon the body of prosecutrix which shows commission of rape upon her. Therefore, no confirm opinion can be given with regard to commission of rape upon the prosecutrix Vimla. Likewise, as per the counsel for the appellant, the prosecution has failed to prove its case because there was no direct evidence or independent witness to support the prosecution story. Thus, the conviction on the basis of statement of PW-1 – Prosecutrix and PW-2 – husband of prosecutrix deserves to be set aside. Further, learned counsel for the appellant vehemently argued that none of the allegations made by the prosecutrix

in her statement is supported by any evidence. It is stated by her that 'nada' of her salwar was forcibly broken down by the accused-appellant is totally false because in the FIR Ex.P/1, it is stated by her that 'nada' of her 'salwar' was opened by the appellant. The specific words used in the statement of PW-1 are as follows :

> "……मुलजिम ने मेरे मुँह पर हाथ लगा दिया और मेरी सलवार खोल दी, नाड़ा तोड़ दिया, …… अपने खेत की तरफ भाग गया।"

However, the relevant portion in the FIR-Ex.P/1, reads as follows :

> "...तो मेरे मुंह के आडा हाथ लगा लिया और मेरी सलवार का नाड़ा खोल कर ..... । मेरी चुड़िया टुट गई जो मौके पर पड़ी है।"

Therefore, likewise, it is stated in the statement of PW-1 that when she was going towards her village in the way one Smt. Mahender Kaur met and she narrated the incident to her but Smt. Mahender Kaur PW-7 has categorically stated that she did not meet Vimla on any date nor any story was narrated to her by prosecutrix. Similarly, it is stated by the prosecutrix in her statement that she sent Inderjeet to call her husband but as per the statement of PW-2 Sohan Lal – husband of prosecutrix, he was informed by one Pappu @ Patwari S/o Kartar Singh that your wife has called you at home and the prosecution witness

Inderjeet PW-5 who was named by prosecutrix herself turned hostile and stated that he never went to call PW-2 Sohan Lal as per the contention of prosecutrix and he has been declared hostile by the learned trial court. It is further contended by the learned counsel for the appellant that as per Ex.P/17 - recovery memo of 'salwar', it is nowhere mentioned that it was carrying any evidence of human semen. So also, PW-8 Dr. Rajendra Kumar has given categorical opinion that at the time of medical examination of prosecutrix, there was no apparent evidence of committing rape nor there was injuries on private parts of the body of prosecutrix. As per the said recovery memo of 'salwar, 'nada' was intact whereas as per the statement of prosecutrix before the court, it was stated that 'nada' was broken down due to force used by the accused-appellant. The story of prosecution is also not trust-worthy because the independent witnesses Arjun Singh and Sheokaran who put their signatures upon the recovery memo of 'salwar' were not produced before the Court even their names were not mentioned in the list of witnesses. Likewise, out of two witnesses of recovery of four pieces of bangles, Gurdayal Singh and Jeet Singh, only Jeet Singh was produced as prosecution witness and Jeet Singh PW-6 has turned hostile before the court. Therefore, the contention of recovery of bangle's pieces from the place of occurrence was not proved by the prosecution. Similarly, only one witness PW-6 Jeet Singh was

produced before the Court who was witness of recovery, preparation of site plan and inspection plan but PW-6 Jeet Singh turned hostile before the Court, therefore, the statement of PW-1 cannot be believed. Likewise, it is further contended by the learned counsel for the appellant that PW-2 Sohan Lal – husband of prosecutrix is a witness of hearsay evidence as per his statement which did not prove the case of PW-1 prosecutrix. Therefore, it is obvious that appellant has been falsely implicated in this case. There is no independent witness nor there is any corroborative evidence of the statement of prosecutrix. None of the prosecution witnesses including the medical evidence is corroborating the story narrated by the prosecutrix. No one is supporting or proving the case of the prosecutrix as stated by her in her statement as well as in FIR. The appellant has been falsely implicated in this case. Therefore, the judgment under appeal given by trial court is erroneous and deserves to be set aside and the appellant is entitled to be acquitted. Learned counsel for the appellant has placed reliance upon the judgment rendered by Apex Court in case of Dilip & Anr. Vs. State of M.P., reported in 2002 WLC (SC) Criminal 224.

Par contra, learned Public Prosecutor vehemently opposed the prayer and contended that in case for offence under Section 376 I.P.C. obviously,

the statement of prosecutrix, who is victim, is required to be accepted in toto. It is also contended that as per the settled principle of law by the Apex Court the statement of prosecutrix cannot be disbelieved even if it is not supported by any other prosecution evidence. It is also contended that age of prosecutrix, which was more than 30 years is totally irrelevant, if allegation of rape is alleged by her. It is also contended that though except PW1 and PW-2 – husband of prosecutrix, no other person has supported the statement of prosecutrix but the fact remains that offence of rape is serious in nature and it is required to be dealt with seriously by the Court and accused should not be given any benefit if allegations are levelled by the prosecutrix for committing rape because she is the victim of offence and in absence of any evidence the statement of prosecutrix has to be relied upon and the same has rightly been relied upon by the trial court. Some contradiction in the statement of PW-1 and PW-2 cannot be a ground for acquittal but the courts are only required to rely upon the statement of prosecutrix.

I have considered the arguments advanced by both the parties and perused the record of the case. In this case, the basic question which requires adjudication is whether on the basis of evidence on record, it can be said that prosecution has proved its case beyond reasonable doubt or not. It is not

doubted that for the offences like rape the sole evidence of prosecutrix is relevant but similarly it may not be corroborated by other eye witnesses but there must be some circumstances and evidence which can corroborate the story narrated by the prosecutrix.

I have perused the statement of prosecutrix Mst. Vimla PW/1. The statement with regard to breaking 'nada' of 'salwar' is not corroborated because Ex.P-17, the recovery of salwar does not speak that 'nada' inside the 'salwar' was broken. Moreso, it is mentioned in Ex.P-17 that :

> "सलवार को देखा गया तो सुती छीट बरंग पीली वा अन्दर जामनी नसवारी सफेद बूटी है सलवार में पीला सूती धागों से बुना हुआ नाड़ा डाला हुआ है।जिसको उलट पुलट कर देखा गया तो कोई वीर्य वगैरा के धब्बे नजर नहीं आ रहे है।"

Likewise, in the FIR, Ex.P-1, it is contended by the prosecutrix herself that :

> "मेरे मुंह के आडा हाथ लगा लिया और मेरी सलवार का नाड़ा खोल कर ..... बुरा काम कर लिया."

Meaning thereby, right from filing FIR and preparation of Ex.P-17, recovery of 'salwar', there was no allegation that accused broken the 'nada' of 'salwar' and committed rape. But in the statement before the Court, it is contended by the prosecutrix that :

> "मुलजिम ने मेरे मुँह पर हाथ लगा दिया और मेरी सलवार

खोल दी, नाड़ा तोड़ दिया, नाड़ा तोड़कर ..... मेरे से सम्भोग किया."

Therefore, the aforesaid fact, which is narrated by the prosecutrix in the court is not corroborated by the documentary evidence, which is FIR - Ex.P-1 and recovery of 'salwar' Ex.P-17. Similarly, the said 'salwar' was recovered in presence of two independent motbirs Arjun Singh and Sheokaran but both of them were not produced before the court as prosecution witnesses and from bare perusal of Ex.P-17, it is clear that upon inspection of 'salwar' by Investigating Officer, no spots of semen were found. Therefore, apparently, the recovery of 'salwar', which is said to be recovered as per the statement of PW-2 Sohanlal – husband of prosecutrix, recovered from the house of prosecutrix cannot be treated to be proved because it is nowhere mentioned in Ex.P-17 that from where the said 'salwar' was recovered. Likewise as per the statement of Investigating Officer PW-11, 'salwar' was taken into custody upon the site and apparently there was no evidence with regard to spots of semen nor it was damaged. Therefore, it cannot be said that recovery of 'salwar' is proved. Consequently, as per the statement of PW-8 – Dr. Rajender Kumar, he has categorically stated that after examination there was no positive sign of rape. In his statement, he stated as follows :

> "मु: बिमला ने बताया कि दिनांक 28.9.86 को शाम के करीब 6 बजे उसकी मर्जी के बिना गुरतेजसिंह ने खेत में उसके साथ संभोग किया था। उपरोक्त मुआयने के आधार पर मैं बलात्कार के बाबत कोई निश्चित राय नहीं दे सकता था क्योंकि बलात्कार का कोई पोजीटिव साईन नहीं था"

Further in the statement of PW-8, it is stated that he took vaginal smear for chemical examination and handed over to the police vide Ex.P-14 and as per the chemical examination report, Ex.P-3, human semen was found in the said vaginal smear. It is also stated by PW-8 that there was no mark of injury upon the body of prosecutrix. The prosecutrix was also 32 years of age and as per the doctor's report, there were no marks of injury upon the private parts of the body of prosecutrix. On this count also, it can be said that the story narrated by the prosecutrix is not even supported by the Doctor. But when 'salwar' and vaginal smear were sent for chemical examination along with one underwear of accused and report was given by the chemical examiner that human semen was detected from packet – A and packet – B but semen was not detected from Ex.P-3, which is underwear of the accused. It is also very important to state here that prosecutrix is a married woman and having children also and FIR was registered on 29.9.1986 at 08.00 a.m. in the morning and offence was alleged to be committed on 28.9.1986 at about 6 O' Clock in the evening and her husband PW-2, who was also declared hostile by the trial court, came back to the house and

when he was informed as per the statement by Pappu patwari in the night, prosecutrix and her husband both went to the police station in the morning though the police station was only 15 kilometer far from village where prosecutrix is residing. Therefore, it is apparently clear that recovery of 'salwar' is doubtful and as per the statement of PW-8 there was no positive sign with regard to rape nor any injury was found upon the body of prosecutrix at the time of examination conducted on 29.9.1986 at 11.20 a.m. Therefore, it is not safe to arrive at the conclusion that prosecution has proved its case beyond reasonable doubt. It is also very strange that in the list of witnesses to prove the prosecution case, names of 13 witnesses were mentioned in which the names of Arjun Singh and Sheo Karan were not included nor they were shown as prosecution witnesses whereas both these persons were witnesses of recovery of 'salwar', which is said to be sent for chemical examination. Therefore, only on the basis of chemical examination report, in which at the time of chemical examination, which is said to be prepared on 22.9.1987, human semen was detected from packet-A and packet-B, which is salwar and vaginal smear collected by medical jurist from the body of a married lady of 32 years of age, it cannot be said that semen was result of rape because PW-8 Dr. Rajendra Kumar has categorically stated in his statement that there was no positive sign of rape.

As per the above discussions, the evidence emerging from the record speaks that prosecution has failed to prove its case beyond reasonable doubt. It is true that none of the witnesses are supporting the version of prosecutrix. It is also prosecution case as per the statement of PW-8 Dr. Rajendra Kumar that at the time of medical examination, there was no positive evidence of rape, there were no injuries upon the body nor there was any evidence with regard to commission of rape. PW-8 Dr. Rajendra Kumar has also stated in his statement that there were no positive sign of rape but it is stated by him that for the purpose of chemical examination, vaginal smear was taken and sent for chemical examination and in chemical examination, human semen was found but the fact remains that prosecutrix was married woman and so-called Salwar, which is said to be recovered was also containing human semen but recovery of Salwar is not proved by the prosecution because two witnesses of recovery of salwar namely Arjun Singh and Sheokaran were not produced before the court by the prosecution. Therefore, when the recovery of salwar is not proved then the report of chemical examination in which human semen was found upon the salwar is totally irrelevant for the purpose of convicting the appellant. Even witnesses of recovery of salwar namely Arjun Singh and Sheokaran were not arrayed in the list of witnesses by the prosecution at the time of filing challan. When the recovery of Salwar is not proved so also no human

semen was found upon underwear of accused - Ex.P/3 in the chemical examination, then it cannot be said that at the time of examination by FSL, the semen found upon salwar was belonging to the appellant. Thus, upon scrutiny of entire evidence, the only evidence which is emerging from the FSL report that too cannot be treated to be relevant for the purpose of convicting the appellant. Salwar of Prosecutrix and underwear of appellant both were sent for chemical examination along with vaginal smear but no semen was found upon underwear of accused and as per the report human semen was found upon salwar and this is also important fact that prosecutrix was married woman of more than 30 years of age and she was examined by PW-8 Dr. Rajendra Prasad after one day of the occurrence and in the night she was living with her husband and as per report of PW-8 Dr. Rajendra Prasad, at the time of first examination, no positive sign of rape was found.

I have also gone through the aforesaid judgment cited by learned counsel for the appellant in case of Dilip & Anr. Vs. State of M.P. (supra) wherein the Apex Court while dealing with the similar controversy has held that when evidence is not positively supported by medical evidence, it is difficulty to accept truthfulness of version of prosecutrix. Para-14 of the aforesaid judgment reads as follows :

"The age of the prosecutrix was around 16 years, may be a little more. The fact remains that she was not just a child who would have surrendered herself to a forced sexual assault without offering any resistance whatsoever. Without going into testing truthfulness of the explanation offered by the prosecutrix that because of being over-awed by the two accused persons she was not able to resist, the fact remains that the 'probabilities factor' operates against the prosecutrix. The gang rape is alleged to have been committed at about 2 p.m. in her own house, situated in a populated village by the side of the main road where people were moving on account of Holi festival. The prosecutrix did raise hue and cry to the extent she could and yet none was attracted to the place of the incident, the prosecutrix is said to have sustained injuries, also bleeded from from her private parts staining her body as also the cloths which she was wearing. This part of the story, is not only not corroborated by the medical evidence, is rather belied thereby. The presence of blood-stains is not confirmed by forensic science laboratory or by the doctors who examined the prosecutrix. Her own maternal aunt to whom the story of sexual assault has been narrated by the prosecutrix as given in the Court. The learned counsel for the State relied on Section 114A of Evidence Act, 1872 which provides that in a trial on a charge under Section 376(2) (g) of IPC on the prosecutrix stating that she was not a consenting party, the Court shall presume absence of consent of the woman alleged to have been raped. Suffice it to be observe that we should not misunderstood as recording a finding that the prosecutrix was a willing party to sexual intercourse by the accused persons. The court is finding it difficult to accept the truthfulness of the version of the prosecutrix that any sexual assault so alleged was committed on her in view of the fact that her narration of the incident becomes basically infirm on account of being contradicted by the statement of her own aunt and medical evidence and the report of forensic science laboratory. The defence has given suggestion in cross-examination for false implication of the accused persons which however have not gone

> beyond being suggestions merely. It is not necessary for us to dwell upon further to find out the probability of truth contained in the suggestions because we are not satisfied generally of the correctness of story as told by the prosecutrix. We find it difficult to hold the prosecutrix in the cases as one on whose testimony as implicit reliance can be placed."

In these circumstances and taking into account the aforesaid enunciation by Apex Court, it is clear that the prosecution has failed to prove its case beyond reasonable doubt and the trial court has committed an error while convicting the appellant. Thus, it would not be proper to convict the appellant for the alleged offence under Section 376 I.P.C.

In view of what has been stated above, this appeal deserves to be allowed and the same is hereby allowed. The judgment of the trial court is setaside. The appellant is acquitted from the charge for offence under Section 376 I.P.C. The appellant is on bail. The bail bonds furnished by him stands discharged.

(GOPAL KRISHAN VYAS), J.

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